IN THE

Supreme Court of the United States

—o—o—

October Term, 1945

—o—o—

No.————

—o—o—

BARNEY E. GASKILL, Et Al.,
Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago & North Western Railway Company, Et Al.,
Respondents.

—o—o—

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

—o—o—

The opinion of the Circuit Court of Appeals for the 8th Circuit is found in the additional C. C. A. record, page 6.

As previously stated in this record the opinion of Judge Woodrough, which is found on page 7 of the additional printed C. C. A. record, shows the history of this case, and the substance of the claim of petitioners and defendant and of the Order of Brotherhoods, collective bar-

gaining agent, up until page 10 of his opinion, and on that page is appended the Finding of Facts and Conclusions of Law on which the Court based its judgment of dismissal, fairly states the history of this case and contentions of the parties.

On the top of page 11, it is true that we contended that the lower Court erred and now contend that the Circuit Court erred in finding that the seniority rights of plaintiffs were limited to the division of the Northwestern Railroad on which they were employed, and in finding that the M. & O. track between Omaha and Blair, used in the Omaha and Sioux City runs in controversy, is not a part of the seniority district of the Nebraska Division of employees of the Northwestern Railroad, so as to give them seniority rights on the leased trackage.

Without repeating the reference to the record that we have already set forth in this petition we state generally, now, that the record shows that seniority districts are not necessarily confined to Northwestern Railroad *Divisions.* That "seniority" means the right to do the work, as to trainmen, as of the date of their entering employment of the railroad, and as to conductors, as of the date of their promotion from trainmen to conductors over *certain trackage* over which the employees work, whether *owned by the railroad* or *leased by the railroad*, the *trackage* in this case being *31 and a fraction miles from Omaha to Blair on the Nebraska side,* from *Blair* to *California Junction,* on the Iowa side. That while the seniority district is generally confined to a division of the railroad, that is *not always true.* That this record shows that this 7½ miles from Blair to California Junction is, by stipulation and by the finding of the Court in its opinion, found to be *a part of*

the Nebraska Division of the Northwestern, so that there is no dispute as to that *mileage.* However, it is claimed by the railroad that the 24 and a fraction miles from Omaha to Blair is *not part of any seniority district* over which *any* of the employees of the Northwestern *have seniority rights,* because the *trackage* is not *owned* by the Northwestern, and both the District Court and Circuit Court held that *this trackage was not part of any seniority district.*

It is our contention that is contrary to all the record in this case, as this record shows that Northwestern employees for years have operated over that *trackage,* and that they had the same right as though they actually owned it.

It is stipulated, as shown above, that for years the Nebraska Division of the Northwestern, petitioners herein, have operated over this 24 and a fraction miles from Omaha to Sioux City, leased from the M. & O., and as far east as Missouri Valley, and *they are still doing that.*

The stipulation, however, stating that *trains* from Fremont to Omaha, and Omaha to Blair, and from Blair through California Junction to Missouri Valley, are not the *trains* involved in this controversy, and to that we have agreed, but we still contend that stipulation clearly shows that the *trackage* in controversy has always been manned and operated by the employees of the Nebraska Division of the Northwestern until this controversy arose.

It is stipulated that prior to May 1, 1930, the Sioux City Division never came nearer to Omaha than California Junction, Iowa, and the Nebraska Division never went farther than from Omaha to California Junction on the

route from Omaha through Blair to California Junction and to Sioux City, the route in controversy.

The record above shows that in statistical reports made by the railroad they reported this *24.7 miles of leased track as being part of* the Eastern or Nebraska Division of the Northwestern. The Court in its opinion said that they find provisions in Exhibits "A" and "B" that give them any seniority rights *over this trackage.*

"Seniority rights" have been claimed and operated over this railroad and others long before any collective bargaining agreements, and the bargaining agreements, Exhibits "A" and "B", are but continuations of like agreements that have been in force for years by these railroads.

Certainly, if the Nebraska Division, formerly Eastern Division, have always operated over this *disputed trackage,* and still operate some *trains,* it is the best evidence in the world that this 24 and a fraction miles was *part of the Nebraska seniority district* of the Northwestern, even though *owned* by the M. & O., but over which the Northwestern has operated under a lease for 48 years.

In *Wash. Term. Co. v. Boswell,* 87 L. Ed. 1694, 63 S. C. R. 1430, 319 U. S. 732, the sole controversy there decided involved the seniority rights over tracks *leased by various railroads from the Wash. Term.* in Washington, D. C. Therefore, we contend it makes no difference whether the trackage is *owned* or *leased* by the railroad, it is still part of their *operating division,* and *must be in some seniority district,* and the proof shows here that prior to May 1, 1930, this trackage has always been manned by employees of the Eastern, now Nebraska, Division of the Northwestern.

Both the lower Court and the Circuit Court held that the seniority district were confined to a railroad division under one superintendent. We contend there is nothing in the record to substantiate that claim. The Court had to go to the *book of rules* to define a *railroad division* as *one under one superintendent,* but we objected to that on the ground that it was stipulated, and both Courts now hold, that Exhibits "A" and "B" constitute the *whole collective bargaining agreement* and binding upon all employees whether they belong to the union or not. Therefore, the railroad could not, by adopting different rules, change the rights of the employees under the bargaining agent agreement, and our objection on that ground should have been sustained.

The bargaining agreements, Exhibits "A" and "B", do not provide that seniority district is confined to a railroad division under one superintendent.

The Circuit Court found, that after a change was made in the method of handling traffic by the M. & O., that when the new work was put into effect giving the joint traffic of the M. & O. and of the Northwestern over the 31 and a fraction miles from Omaha to Blair and Blair to California Junction and from there to Sioux City, Iowa, to the crews of the Northwestern, the M. & O. employees claimed that they were treated unfairly because all that work was being done by crews of the North Western, and that crews of the M. & O. should get their share of that joint work.

This was true, but that dispute involved only the right of the *M. & O. employees generally* and the right of the *Northwestern employees generally* to do that joint work, and after considerable negotiations it was agreed

that that joint work should be divided on a basis of *25%* to go to the *Omaha* employees and 75% to go to the employees of the *Northwestern as that was inter-railroad service.*

It is our contention, that is as far as that dispute went, that agreement only settled that dispute.

However, our contention has been throughout all these proceedings, that we have no complaint as to that settlement, but that we claim that the bargaining agreements provide, "that where the work goes over two seniority districts the work should be divided between the employees of each seniority district on a mileage percentage basis, as set forth in Sec. 60 of Exhibits 'A' and 'B'," which also provide, "as to trainmen, when trainmen run over more than one freight district, involving more than one *seniority district,* percentage of miles run over each district will govern the assignment of such runs" (Ex. "B", p. 19, printed record).

Exhibit "A" provides, "when conductors run over more than one freight district, under more than one superintendent, percentage of miles run over each district shall govern in assignment of such runs."

The evidence clearly shows that since this new arrangement the Sioux City Division has been doing all the work of the Northwestern from *Omaha, Nebraska,* to *Sioux City, Iowa,* traveling over the 31 and a fraction miles herein in controversy, which includes the *24.7 miles of M. & O. track* under lease to the Northwestern.

It is stipulated in the record that the distance from Omaha to California Junction is approximately 30% of

the total distance from Omaha to Sioux City over these disputed runs, therefore, it has been our contention that we should be entitled to 30% of the 75% that was determined by the agreement between the two roads, above set forth, and the Sioux City Division was entitled to 70% of the work. Both the District Court and the Circuit Court held that these disputes were submitted at the same time, that the settlement was made between the employees of the two railroads, and that settlement decided that these runs were inter-railroad service, and *not inter-divisional runs.*

It is our contention that is not true, that there is not a bit of evidence to show that the controversy involved in this lawsuit was ever *even submitted for decision at any time* to the bargaining agents and the railroad.

The Courts, therefore, erred in holding that those disputes were settled.

We are contending further that, even assuming that said disputes were decided, that if this was done it was done without our knowledge, or consent, and we are not bound by that agreement, for the reason that the bargaining agents, as such, have no right to determine the private property right of the individual employees once they have been acquired and that these seniority rights are such property rights. Both Courts held that these settlements were peculiarly within the rights of bargaining agents, and the railroads and the Courts would not interfere. In this we contend that both Courts were in error, our position being that these rights to do this work, once they have been acquired, are property rights of which petitioners cannot be deprived without notice and an opportunity to be heard under the due process clause of the Fifth Amendment of the United States Constitution.

We contend that this has been determined contrary to this Circuit Court's decision by the 7th Circuit in the case of *Nord v. Griffin,* 86 Fed. (2d) 481.

That it is out of harmony with the recent decisions of the Supreme Court of the United States, that of *Steele v. L. & N. Ry.,* 89 L. Ed. Adv. Opinion 4, page 172, 65 S. C. R. 226, and *Tunstall v. B. of L. F. and E. O. L. No. 76,* 89 L. Ed. 181, 65 S. C. R. 235

The Tunstall case followed the reasoning of the Steele case, both written by the Chief Justice. The two cases involved the right of the railroads and the union as bargaining agents to enter into an agreement depriving *colored employees* of their seniority by entering into an agreement which *discriminated against them.* They were non-union employees because under the rules of the brotherhood they could *not belong* to the *brotherhood.*

In those cases the brotherhoods, purporting to act as representatives for the entire craft of firemen, without informing the negro firemen or giving them an opportunity to be heard, served notice on the respondent railroad and 20 other railroads, operating principally in the southeastern part of the United States, that they desired to amend the existing collective bargaining agreement in such manner as ultimately to exclude all negro firemen from the service. By established practice on the several railroads so notified, only white firemen could be promoted to serve as engineers, and the notice proposed that only promotable (that is white) men should be employed as firemen or assigned to any runs or job or permanent vacancies in established runs, or purpose. The railroads and brotherhoods, as representatives of the craft, entered into a new agreement which provided that more than 50% of the firemen in

each class of service, in each *seniority district,* should be negroes, and until such percentage should be reached all new runs and all vacancies should be filled by white men, and the agreement did not sanction the employment of negroes in any seniority district, in which they were not working. Under this rule the negroes were disqualified and a lot denied their rights, and they were assigned to more arduous employment, longer and less work, in local freight service. The Supreme Court of Alabama held that they had the right to make this kind of an agreement.

The Supreme Court of the United States held, however, that they did not think Congress intended to authorize a labor union, chosen by a majority of the craft to represent the craft, did not intend to confer plenary power on the unions to sanction for the benefit of the members the rights of the craft. *They held that bargaining agents, as such, did not have such power.* This same reasoning was followed in the Tunstall case.

It was further pointed out in those cases that the purpose of the act was to provide for the prompt and ordinary settlement of all disputes concerning *wages, rate of pay, rules and working conditions,* and *not to deprive minority of any rights* that they may have acquired by them.

Again in *Elgin-Joliet & Eastern R. R. v. Burley,* 89 L. Ed. 17, page 1328, in discussing the rights of administrative organization such as the Railroad Adjustment Board, this Court held, "that the bargaining agents *as such* have *not the right to determine* and settle the private property rights of the individual employees, unless it is clearly shown that they were duly authorized by the individual employees to represent them, and they agreed to

be bound by their decisions." This is a long and exhaustive opinion. At page 1340 of the opinion petitioners claimed that "the intention of the act was to make the collective agent the employees' exclusive representative for the settlement of all disputes, whether arising out of the application of such collective agreement or otherwise."

This same statement was again urged by petitioners (p. 1341), but Your Honors said, "that that construction would be contrary to the clear import of its provisions and to its policy."

Again on page 1346 it is stated:

> "The collective agreement could not be effective to *deprive the employees of their individual rights,* otherwise *those rights* would be brought within the collective bargaining power by a mere exercise of that power contrary to the purport and effect of the act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the act clearly does not contemplate that the rights may be nullified merely by agreements between the *carrier* and the *union.*"

The Circuit Court in its opinion held that the District Court procedure and ruling were in accord with the well-settled law.

Its conclusion was plainly compelled by the decision of this Court in *Div. 525, O. R. C., v. Gorman,* 133 Fed. (2d) 273, where the Court required that such an agreement as was shown in this case was under the stated circumstances subject to recision, and which *through the collective bargaining process.* The facts are that in this case the record shows that there was no change *attempted to be made in the bargaining agreement.*

It is our contention that the decision of the Gorman case is out of harmony with the decision in the Elgin case above referred to, and as a matter of fact Justice Frankfurter relied on the Gorman case in his dissenting opinion. (See top of first paragraph, page 1353, Elgin case.)

The Gorman case is clearly distinguishable also for the reason that it arose in the state of Arkansas, and there was *no prior state decision construing the collective bargaining agreement,* while in this state our Court, in *Rentschler v. Mo. Pac. R. R.,* 126 Neb. 493, 253 N. W. 693, 95 A. L. R. 1, squarely held, following *Piercey v. L. & N. R. Co.,* 198 Ky. 477, 248 S. W. 1042 (1045), 33 A. L. R. 322, that the right secured by these bargaining agents is the individual right of the individual member, and such organization can no more by its arbitrary act *deprive that individual member of his right* so secured than *can any other person.* That the trade union is not the agent of a member for the purpose of *waiving any personal right he may have,* but only for the limited purpose of securing for him, together with all other members, *fair* and *just wages* and *good working conditions.* And further held, an agreement by a member of a trade union to abide by its by-laws, rules and regulations, and to comply with the will of the lawfully constituted majority, does not require a member to submit to the determination of the union any question involving his *personal rights.* Citing other cases. This case further held, that even though the plaintiff submitted his grievance to arbitration, he was not bound thereby, and could appeal to the Court. The Court holding, that under the Nebraska Constitution all such provisions are void as against public policy.

Your Honors held in the case of *Erie v. Tompkins,* 304 U. S. 644, 58 S. C. R. 817, 114 A. L. R. 487, that the

Federal Court was bound by the *local decisions of the state Court.*

And in *Moore v. Ill. Central R. R.*, 312 U. S. 630, 61 S. C. R. 754, 84 L. Ed. 1099, you squarely held that a decision by the *state Court* involving the construction of *these seniority rights* was binding on the Federal Court under the Erie-Tompkins case above referred to.

We contend, therefore, that this Court should grant a Writ of Certiorari to review the decision of the Circuit Court of Appeals, for the reason that it is a matter of great public importance and involved the due process law clause of the Fifth Amendment of the United States Constitution. It involves the further question as to whether or not private property rights of individual members of which seniority rights can be determined by the bargaining agent without notice and an opportunity for the individual employees to be heard, and whether or not the decision in this case is not in conflict with the *Steele* decision, *Tunstall* decision and the *Elgin* case of the United States Supreme Court, and whether or not the decision in the Rentschler case is not binding under the Erie-Tompkins rule on this Federal Court, as held by the *Moore* case.

We again assert that the rights we are seeking to recover here, although we started this suit in May, 1939, *have not as yet been determined.* That the question in controversy was not involved in the so-called settlement of the agreement between the employees of the *M. & O. Railroad,* and employees of the *North Western Railroad,* and the Court should have decided the question as to whether or not its decision was in conflict with the Supreme Court of the United States cases above cited and whether or not it was not bound by the Rentschler decision under the Erie-Tompkins rule.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing such decision of said Circuit Court of Appeals.

S. L. WINTERS,
GEORGE O. BURGER,
Counsel for Petitioners.

15

In the

Supreme Court of the United States

October Term, 1945

No. 693

BARNEY E. GASKILL, ET AL.,

Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago and North Western Railway Company, et al.,

Respondents.

RESPONDENTS' RESISTANCE TO PETITION FOR CERTIORARI

WYMER DRESSLER,
ROBERT D. NEELY,

Counsel for Chicago and North Western Railway Company,

WM. T. FARICY,
NYE F. MOREHOUSE,

Of Counsel.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

In the

Supreme Court of the United States

October Term, 1945

No. 693

BARNEY E. GASKILL, ET AL.,

Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago and North Western Railway Company, et al.,

Respondents.

RESPONDENTS' RESISTANCE TO PETITION FOR CERTIORARI

Respondents resist the petition for certiorari for the following reasons:

1. The decisions of both the District Court and the Circuit Court of Appeals were (upon stipulated evidence) that petitioners, employees of the Chicago and North Western Railway Company, do not have any seniority rights on the line of the Chicago, St. Paul, Minneapolis and Omaha Railway Company between Blair and Omaha, since the trackage is not a part of the Nebraska Division of the Chicago and North Western Railway, as contended by petitioners (Finding 3 of the District Court, Record 197; approved by C. C. A., Supplemental Record, 14-15).

2. That neither the collective bargain agreements sued upon, Exhibits A and B to complaint, nor the union decision of August 19, 1930, awarded to petitioners or the Nebraska Division (C. & N. W.) men any participation in the disputed runs, and that the Courts cannot make a contract for them (Findings, District Court, 3 and 4, Record 197-8; C. C. A., Supplemental Record 14-17).

3. There is involved no question of local law; nor any Federal question, save that collective bargaining is required under the Railway Labor Act, and has been duly observed in this case (District Court conclusions 1, 2, 3, 4, Record 199-200; C. C. A. Opinion, Supplemental Record 17).

ARGUMENT

I.

The decision of the District Court and of the Circuit Court of Appeals both rest upon the issue of fact

decided upon stipulated evidence that petitioners and their group have suffered no violation of their seniority rights as to the trackage on the line of Chicago, St. Paul, Minneapolis and Omaha Railway between Omaha and Blair, Nebraska, because as a matter of fact, that trackage is not a part of the Nebraska Division of the Chicago and North Western Railway as contended by petitioners. That fact issue should be regarded as settled by the decisions of said courts.

II.

Petitioners' suit is based upon the claim that the general collective bargaining agreements, Exhibits A and B attached to the complaint, gave to petitioners and their group seniority rights over said disputed trackage. Both lower courts held that they did not. In addition, both lower courts held that since the collective bargaining agreements and the decision of August 19, 1930, determined that the runs which are involved in this case between Sioux City and Omaha are inter-railroad runs (that is, runs covering two separate railroads), as distinguished from inter-division runs (that is, over two divisions of the same railroad), and such agreement did not award to petitioners or their group any participation in such disputed runs, petitioners have no claim which a court may enforce. The opinion of the Court of Appeals is printed as a part of the record (Supplemental Record, 6-20), and fully reflects that situation. The holding of both courts is that whether or not petitioners should participate in the disputed runs is peculiarly within the province of collective bargaining, and that the court cannot make a bargain for them.

III.

There is no question of local law. *Rentschler v. Mo. Pac. R. R.,* 126 Neb. 493, 253 N. W. 693, relied upon by petitioners dealt with collective bargaining rights already in being, and allowed damages for their violation. Petitioners, not having been awarded the asserted rights by collective bargaining, the Rentschler case has no application. Neither is there any violation of the rule stated in *Elgin-Joliet R. R. v. Burley,* 89 L. Ed. Adv. Opinion 17, page 1328. That case also dealt with rights already accrued, but not with future arrangements. The collective agreement of August 19, 1930 (Record 193-5, 198; also Supplemental Record Opinion of C. C. A., page 8, et seq.), dealt exclusively with rights for the future. Petitioners are still free to pursue their quest by collective bargaining. But until they accomplish their purpose, and have been awarded collective bargaining rights, they have nothing to enforce in court, and have not been deprived of any rights under the Fifth Amendment, or otherwise.

Respectfully submitted,

WYMER DRESSLER,

ROBERT D. NEELY,

Counsel for Chicago and North Western Railway Company.

WM. T. FARICY,

NYE F. MOREHOUSE,

Of Counsel.